

WHAT YOU HAVE TO PROVE TO RECOVER COMPENSATION IN A CIVIL SUIT

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Two things. First, you have to prove “liability” on the part of the other driver by showing that he or she was legally “negligent.” Once liability is established, you then have to prove that such negligence “proximately caused” your injuries and resulting economic losses (legally speaking, your “damages”). We’ll discuss damages at greater length in a minute, but first let’s focus on negligence.

NEGLIGENCE: THE “REASONABLY PRUDENT PERSON” STANDARD

What is legal negligence exactly? Legally speaking, a “negligent” act is considered a “tort” or a “wrongful” act of carelessness that directly causes injury to another. More specifically, *Black’s Law Dictionary*, often cited with authority for defining legal terms, defines “negligence” as “the failure to use such care as a reasonably prudent and careful person would use under similar circumstances...”¹

If this sounds like a rather fluid, slippery concept, it is. What constitutes a negligent act under one set of circumstances may not be a negligent act under another.

Let’s consider a simple example. Under one scenario, a driver is driving the posted speed limit of 45 mph on a dry road on a clear sunny day when his front tire blows out unexpectedly, causing him to lose control and veer into the oncoming lane, causing an accident. Assuming nothing he did (or didn’t do) caused the tire to blow out, was he negligent? Maybe yes, maybe no, depending on a variety of circumstances, but he probably wasn’t negligent simply for driving 45 mph if that was the posted speed limit.

Now, let’s change the facts a little. Assume the driver was going the same speed on the same road (45 mph), but there was a thick fog on the road that caused him to veer

¹ This is the essence of it. A more complete, formal legal definition of “negligence” from *Black’s* follows:

The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do. Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances; it is the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances. *Black’s Law Dictionary*, 5th Edition (1980). (Note: This is a broad dictionary definition of the term and concept, the essence of which may vary to some degree, depending upon the particular state jurisdiction involved.)

into the oncoming lane. Was it negligent for him to be driving 45 mph in that thick fog even though he was at the posted speed limit? Well, under these facts, there is certainly an argument that he was negligent because he was driving unreasonably fast considering the foggy conditions and diminished visibility. The driver's speed, when combined with the different road conditions, may result in the court applying a different standard of care against which the reasonableness of his actions are to be judged by the court and jury if the case goes to trial. In other words, what may be "negligent" under one set of conditions may not be in another. That is one of many reasons why no two cases are ever the same in the eyes of the law.

This is also why you should never rely upon the advice of your Uncle Leon or your cousin Larry down the street, who are more than eager to give you their "legal advice" based upon what happened in their cases that were "just like yours." Remember this: *no* case is "just like yours" no matter how similar it may appear. That's why getting competent legal advice based upon a thorough understanding of your particular case, with all of its factual and legal subtleties, is the only way properly to determine the merits and value of your claim.

DAMAGES: WHAT ARE THEY? HOW MUCH ARE YOU ENTITLED TO RECOVER?

If you are injured in an accident caused by the negligence of another driver, what types of compensation are you entitled to recover?

This compensation is called "damages," and in Virginia, depending on the facts of your case (a recurring theme right?), it could include your medical expenses and costs of treatment and therapy; lost wages for time away from work due to hospitalization, medical treatment and recovery; future medical expenses that are reasonable and necessary; property damages (the physical damage to your motorcycle and riding accessories); and last but not least, compensatory damages for the "pain and suffering" incurred by you as a result of your injuries.

In addition to these types of damages, in very rare cases, and I mean VERY rare, "punitive damages" can be awarded—not to compensate you, the plaintiff, but actually to *punish* the defendant for negligent actions so extreme and reckless that he or she deserves it.² Contrary to the "tort reform" ads you may have heard produced by the insurance industry, however, these types of damages are not favored under the law of Virginia or the District of Columbia, and are rarely awarded. And although emotionally you may want to "punish" that negligent driver for the injuries he or she caused you, it is important to remember that the primary function of a civil claim for negligence is to *compensate* you for injuries sustained, not to *punish* the other guy. That is the one of the primary functions of the criminal courts, not the civil.

² This is true in Virginia and D.C., but varies considerably on a state-by-state basis. If you are injured in another jurisdiction, consult with a local attorney who can advise you on the burden of proof required to establish punitive damages in your state. The requirements vary widely.

PRE-EXISTING INJURIES

Things get interesting here, though not necessarily in a good way. Let's assume the following facts. Say you herniated (i.e. "slipped") a disc in your lower back four or five years ago, and after a lot of physical therapy and treatment, the pain has finally subsided to where it generally doesn't bother you anymore. Then one fine Saturday morning when you are out for a ride with your buds on Skyline Drive³, a careless driver enjoying too long a look at the Shenandoah Valley veers into your lane and runs you off the road. Your bike is a little banged up, but fortunately you have only a few bruises and scrapes - no broken bones or serious injuries as far as you can tell. Over the next few days, however, that old back injury flares up with a vengeance.

Not being a whiner, you tough it out with Advil for a few days, hoping it will go away—but it doesn't. Then, by the end of the week, you're in such pain you can hardly get out of bed. Finally, you go to your orthopedist, who confirms what you already know. You have "re-injured" that nagging disc in your back. Have you suffered compensable damages from the recent accident even though it's related to an old, or "pre-existing" injury?

The quick answer is *yes*, but the challenge is proving it. In this case you have to prove that *this* particular driver's negligence caused *these* re-injuries. If they are substantial, the insurance adjuster (or the insurance company's lawyer if a lawsuit has to be filed) will want to go through all of your prior medical records to determine the precise nature of your pre-existing injury, and look carefully at all of your doctors' notes from each and every one of your prior treatments. Why? Well, the insurance company wants to determine that your old injury really had resolved *prior* to the accident. If you had seen your doctor for the old injury as recently as a few months or even weeks before the accident, the insurance adjuster is going to discount the value of your claim (or even deny it entirely) because your back was already hurting anyway, and your fairly recent visit to the doctor proves it. Ouch!

That's wrinkle number one. What's wrinkle number two? Your delay in getting medical treatment is a red flag to the adjuster that you may be exaggerating your claim. Important point: if you delay getting medical attention for your injuries for days or weeks after the accident, that delay lends further support to the insurance company's position that this "new" injury isn't as bad as you say it is.

What's the lesson here? If you have even the slightest feeling that a crash may have resulted in injuries to you, get checked out without delay. If things resolve quickly, then good for you. But if they don't, and do actually worsen in the coming days, at least you will have a record of having documented your injury in a timely manner by seeking prompt medical attention immediately following the accident.

³ For those readers not familiar with rural Virginia, Skyline Drive is a particularly spectacular and scenic ride along a beautiful ridge through the Shenandoah National Park. The views are awesome, but the twists and turns can leave motorcyclists vulnerable to careless motorists gawking at the scenery.

To review: from a legal standpoint, injured people *are* entitled to recover for preexisting injuries made worse by the carelessness of another. But proving the incremental damage caused by the defendant's negligence is made more complicated and difficult by the existence of a plaintiff's pre-existing injury, and this complexity can substantially reduce the value of your claim, particularly if there is a delay between the date of the accident and the date that you first seek medical attention. A good lawyer will ask you detailed questions about your pre-existing injuries and treatment history, and will ask you to sign a release so that he can obtain your medical records and review them carefully. By understanding the details of your medical history and treatment, your lawyer will be well armed to negotiate effectively with the insurance adjuster, and if necessary, to take your case to trial if the circumstances require it.